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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 UNITED STATES OF AMERICA,
12
13 Plaintiff,
14 v.
15 RUBEN MARTINEZ,
16 Defendant.

Case No. 15-cr-2821-BAS-4

**ORDER DENYING DEFENDANT'S
MOTION TO MODIFY SENTENCE
UNDER 18 U.S.C. § 3582(c)(1)(A)(i)
(ECF No. 474)**

17 After a guilty plea, the Court sentenced Defendant Ruben Martinez to thirty-three
18 months of custody for conspiracy to commit honest services fraud and healthcare fraud.
19 (ECF No. 427.) Mr. Martinez is serving his sentence at the Bureau of Prisons (“BOP”)’s
20 facility in Lompoc, California. He now moves for a modification of his sentence under 18
21 U.S.C. § 3582 in light of the COVID-19 virus. (Mot., ECF No. 474.) Mr. Martinez asks
22 that the Court “resentence him to time-served with the remainder of his sentence to be
23 served in home confinement.” (*Id.* at 2.) Further, Mr. Martinez argues that the Court
24 should excuse the requirement that he first exhaust his administrative remedies by filing a
25 petition with the BOP given the “time-sensitive danger” the virus poses to his health. (*Id.*
26 at 5.)

27 The Court generally may not correct or modify a prison sentence once it has been
28 imposed, unless expressly permitted by statute or Rule 35 of the Federal Rules of Criminal

1 Procedure. *United States v. Penna*, 319 F.3d 509, 511 (9th Cir. 2003). Mr. Martinez cites
 2 to the new compassionate release provision of the First Step Act, 18 U.S.C.
 3 § 3582(c)(1)(A)(i), which allows the Court to modify the term of imprisonment for
 4 “extraordinary and compelling reasons” that “warrant such a deduction.” This provision
 5 is only triggered, however, where (A) the Director of the Bureau of Prisons files a motion;
 6 or (B) the defendant files a motion “after the defendant has fully exhausted all
 7 administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the
 8 defendant’s behalf or the lapse of 30 days from the receipt of such a request by the warden
 9 of the defendant’s facility whichever is earlier.” 18 U.S.C. § 3582(c)(1)(A). In addition,
 10 this Court and “other district courts in the Ninth Circuit who have considered . . . whether
 11 district courts may create an exception to § 3582(c)(1)(A)(i)’s 30-day exhaustion
 12 requirement on the basis of the COVID-19 pandemic . . . have near unanimously concluded
 13 that failure to exhaust administrative remedies is fatal to a compassionate release petition
 14 even in light of the urgency created by COVID-19.” *United States v. Route*, No. CR17-
 15 302-RSM, 2020 WL 2063679, at *3 (W.D. Wash. Apr. 29, 2020) (collecting cases); *see*
 16 *also United States v. Garza*, No. 18-CR-1745-BAS, 2020 WL 1485782, at *2 (S.D. Cal.
 17 Mar. 27, 2020).


18 Further, the Court otherwise lacks authority to designate home confinement. “The
 19 Bureau of Prisons has the statutory authority to choose the locations where prisoners serve
 20 their sentences.” *United States v. Ceballos*, 671 F.3d 852, 855 (9th Cir. 2011) (per curiam)
 21 (citing 18 U.S.C. § 3621(b)). The recommendations of the sentencing court to the BOP for
 22 where the sentence should be served are only given nonbinding weight. *Id.* “While a
 23 [district court] has wide discretion in determining the length and type of sentence, the court
 24 has no jurisdiction to select the place where the sentence will be served. Authority to
 25 determine place of confinement resides in the executive branch of government and is
 26 delegated to the Bureau of Prisons.” *Id.* (quoting *United States v. Dragna*, 746 F.2d 457,
 27 458 (9th Cir. 1984) (per curiam)); *see also Rodriguez v. Smith*, 541 F.3d 1180, 1182 (9th
 28

1 Cir. 2008) (“Under 18 U.S.C. § 3621(b), the BOP has authority to designate the place of
2 an inmates’ imprisonment.”).

3 In this case, the Court is mindful of the serious risk COVID-19 poses for prison
4 inmates. Mr. Martinez is 63-years old and a diabetic. He also submits that he “suffers
5 from high blood pressure, high cholesterol, and sleep apnea.” (Mot. at 2.) Further, the
6 Court agrees that given the nature of Mr. Martinez’s offense, his compliance with pre-trial
7 release conditions, and his lack of prior criminal history, he is not a danger to the
8 community and is not at a high risk to reoffend if he is released. Even so, issues such as
9 Mr. Martinez’s medical condition, the conditions and resources at the BOP’s Lompoc
10 facility, and decisions as to which inmates should be released because of the COVID-19
11 virus are better left to the BOP and its institutional expertise. *See United States v. Read-*
12 *Forbes*, No. CR 12-20099-01-KHV, 2020 WL 1888856, at *4 (D. Kan. Apr. 16, 2020)
13 (“Because defendant is in BOP custody, the BOP is in a better position to initially
14 determine defendant’s medical needs, the specific risk of COVID-19 to her and the inmates
15 generally at FMC Carswell, the risk to the public if she is released and whether her release
16 plan is adequate.”). The Court finds Mr. Martinez’s failure to first exhaust his
17 administrative remedies is fatal to his petition “even in light of the urgency created by
18 COVID-19.” *See Route*, 2020 WL 2063679, at *3. The Court encourages Mr. Martinez
19 to seek relief from the BOP.

20 For the foregoing reasons, the Court **DENIES** Mr. Martinez’s motion to modify his
21 sentence under 18 U.S.C. § 3582 in light of the COVID-19 virus (ECF No. 474).

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23 **DATED: May 13, 2020**


Hon. Cynthia Bashant
United States District Judge